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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 518

ROBERT E. DINEEN, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NEW YORK INDEMNITY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 22-24) is reported at 71 F. Supp. 742.

JURISDICTION

The judgment of the Court of Claims was entered on June 2, 1947 (R. 24). A motion for a new trial was overruled on October 6, 1947 (R. 24-25). The petition for a writ of certiorari was filed on January 6, 1948. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended, and the Act of

March 16, 1944 (Private Law 226, 78th Cong., 2d Sess.) c. 99, 58 Stat. (Pt. 2) 960 (R. 9-10).

QUESTIONS PRESENTED

1. Whether the Government waived the provision for liquidated damages for delay in Section 9 of a standard form construction contract by its failure to terminate the contract because of the contractors' two-month delay in commencing work.

2. Whether the failure of the Government to make monthly progress payments, which resulted in a temporary suspension of work, relieved the contractors from liability for liquidated damages for other delays for which they were solely responsible.

3. Whether the Government is required to prove actual damages from delay in completion of the contract notwithstanding the contract provision that "the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages" a specified sum for each day of delay.

STATEMENT

This action was brought pursuant to special statutory authorization (Private Law 226 of March 16, 1944, c. 99, 58 Stat. (Pt. 2) 960) to recover an amount withheld by the Government as liquidated damages for delay in the perform-

ance of a standard form construction contract (R. 1-6, 9-10). The facts as found by the Court of Claims may be summarized as follows:

On May 12, 1928, the Government entered into a contract with Grunwald and Tudor, Inc., and Elbert Deffebach for the construction of a portion of the highway in Sequoia National Park for the sum of \$91,365.88, later reduced to the sum of \$47,882.52 as the result of modifications in the work to be performed (R. 10, 20).¹ The contract required the work to be commenced within ten days after receipt of notice to proceed and to be completed within 150 days from that date (R. 11). The contractors were to be liable for liquidated damages of \$100 per day for each day of delay in completion of the work unless such delay was "due to unforeseeable causes beyond the control and without the fault or negligence of the contractor" (R. 11). Notice to proceed was received by the contractors on May 21, 1928, thus fixing October 18, 1928, as the contract completion date (R. 12). Work on the project was not begun, however, until July 21, 1928 (R. 12).

¹ Petitioner here, the Superintendent of Insurance of the State of New York, is statutory liquidator of the New York Indemnity Company (R. 10). The Indemnity Company was the contractors' surety for the performance of the contract (R. 10). The completion of the contract was never taken over by the surety (R. 20). Payments thereon were made to the contractors (R. 20). The surety, however, had advanced substantial sums to the contractors and the contractors were under an obligation to, and did, turn over to the surety payments made by the Government (R. 20).

The contract provided for progress payments to be made at the end of each month, or as soon thereafter as practicable, on the basis of estimates made and approved by the contracting officer (R. 12). On October 1, 1928, however, the Government's district engineer in charge of the contract advised the contractors that because of the exhaustion of available funds it might be necessary to issue an immediate shutdown order unless the contractors preferred to finance their own work until a new appropriation should become available in December or January, in which event progress vouchers would be issued to permit bank discounting (R. 12-13). After financing their own operations for one month, the contractors were unable to continue without receiving the contractual progress payments and the district engineer authorized them to suspend operations effective November 1 (R. 13-14). On December 10, 1928, the contractors requested that the contract be terminated and that a settlement for work performed be made with their surety (R. 16). Funds for completion of the work were made available by Congressional appropriation on March 4, 1929, and on March 14 the contractors were paid for the work previously performed (R. 15). On March 7, 1929, the surety's engineer informed the contracting officer that completion of the contract had been placed in his hands and requested an estimate of the work to be completed and information "as to the possible time we might be able

to begin the work" (R. 16-17). On April 3, 1929, the contractors suggested that resumption of work before June 1 would be impracticable and requested an extension of time of 120 days after notification to resume work to complete the project (R. 17-18). The contractors subsequently were ordered to resume work on the contract as of June 1 and were advised that their contract time would be resumed as of that date (R. 18). Pursuant to this direction, work was resumed on the designated day and completed 81 days later on August 20, 1929 (R. 18).

The contractors were charged with 93 days of delay in the completion of the work and \$9,300 was deducted from the balance owed on the basis of the contract provision for the payment of \$100 liquidated damages for each day's delay (R. 19-20). Under the terms of the original contract, the work was to be completed within 150 days of May 21, 1928, namely, October 18, 1928 (R. 11, 12). Revisions in the design of the road and elimination from the contract of a bridge structure and approaches reduced the length of roadway under the contract from 2.65 miles to 1.96 miles and the contract price from \$91,365.88 to \$47,882.52 (R. 12). Nevertheless, the period for completion of the contract remained the same (R. 12). Although the completion date was October 18, 1928, the contractors had completed only 37 percent of the work by October 31, 1928

(R. 21).² Work was not suspended by the Government until November 1, 1928, two weeks after the date of completion (R. 14). The court below found that all delay from the commencement of the work to the original completion date of the contract, October 18, 1928, was attributable to the contractors (R. 21). Apart from the suspension order, weather would have required a stoppage of all work for the winter season after November 13, 1928, and the contractors would not have been able to complete the work by that time (R. 21). According to the contractors, resumption of work was not feasible, because of weather conditions, before June 1, 1929, when it was actually resumed (R. 17, 18).

A period of 456 days elapsed between the date of the beginning of contract time and the completion of the contract (R. 19). In computing liquidated damages, the 212 days between the time work was suspended on November 1 and ordered resumed on June 1, in addition to the 150 days

² The Court of Claims made the following findings with respect to the progress of the work (R. 21) :

Date (1928)	Estimated percentage of work completed	Percentage of contract time elapsed
July 1.....	0	40
August 27.....	5	63
September 25.....	14	83
October 31.....	37	108

allowed for completion, were deducted from the total elapsed time (R. 19-20). The Government's representatives therefore charged the contractors with 94 days' delay and assessed liquidated damages in the amount of \$9,400 (R. 19). The Comptroller General remitted one day's liquidated damages because about half of the contractors' working force was drafted for a period of two days in August, 1928, for the purpose of fighting forest fires, and the balance owing the contractors after deduction of \$9,300 of liquidated damages was paid (R. 20).

Petitioner's claim, as successor in interest to the contractors, that liquidated damages were improperly withheld was rejected by the court below and its petition dismissed on the ground that the contract, including the provision for liquidated damages, had remained in force (R. 24). In reaching its conclusion, the court pointed out that although the Government probably would have been entitled to terminate the contract "because of the contractors' tardiness in performance," it had not done so (R. 23). It further observed that, although the Government issued a suspension order, the contractors, "after the suspension, resumed performance and completed the work" (R. 24). The validity of the liquidated damage provision was upheld because of the difficulty of determining the extent of damages for delay (R. 24).

ARGUMENT

1. Petitioner's argument that its delay in commencing performance required the Government to terminate the contract not only finds no support in *United States v. American Surety Company*, 322 U. S. 96, on which petitioner relies, but is directly contrary to the explicit terms of the contract. Article 9 of the standard Government form of contract, which was employed here, provides for two alternative courses which the Government may pursue in the event of contractor delays.³ The Government is authorized to termi-

³ Article 9 provides in part as follows:

Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers * * *.

nate the contractor's right to proceed, have the work performed by other means, and charge the contractor with any excess cost in the completion of the work. If the right to proceed is not terminated, the contractor is required to continue the work and be liable for liquidated damages in the amount agreed upon. In construing these provisions, the *American Surety Company* case holds only that the Government's election to terminate forecloses its right to recover liquidated damages. There is no suggestion in the opinion that the Government is required to terminate. And it would indeed be a strange rule of law that would impose a duty to terminate and to abandon the alternative right to liquidated damages in cases where the contract clearly provides for an election.

2. Petitioner's contention (Pet. 14) that the Government's failure to make monthly progress payments and the resulting suspension of work "put the liquidated damage obligation out of the contract" is equally untenable. Even assuming *arguendo* that the 13 days' delay attributable to the Government would have justified refusal of the contractors to proceed further under the contract (but see 3 Williston, Contracts (Rev. ed. 1936) § 877),⁴ the fact is that the contractors did

⁴ The lower court found that, although the failure to provide funds caused the contractors to shut down on November 1, 1928, weather would have required termination of the work, in any event, by November 13, 1928, and that because of their

not elect this course but, on the contrary, continued to perform under the contract. In these circumstances, as stated by the court below, "the contract, therefore, remained in force, including its provision for liquidated damages" (R. 24). Obviously, the contractors could not unilaterally elect to keep alive only selected provisions of the contract. If the delays of the Government had prevented the contractors from completing performance by the contract date they would have been relieved of liability for liquidated damages for subsequent delays. *United States v. United Engineering Co.*, 234 U. S. 236. However, where timely performance is not prevented, "the fact that the Government's action caused some of the delay, presents no legal ground for denying it compensation for loss suffered wholly through the fault of the contractor[s]." *Robinson v. United States*, 261 U. S. 486, 488. See also *United States v. Bethlehem Steel Co.*, 205 U. S. 105.

3. Petitioner's final point that the liquidated damage provision is penal and should not be enforced is at odds with numerous decisions of this Court upholding the validity of comparable liquidated damage provisions in Government construction contracts. *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 120-121; *Wise v. United States*, 249 U. S. 361, 365; *Robinson v. United States*, 261 U. S. 486, 488; see *United States v. United Engi-*

own delay the contractors would not have been able to complete the contract work by the latter date (R. 21).

neering Co., 234 U. S. 236, 241. These decisions have recently received the approval of this Court. *Priebe & Sons v. United States*, October Term, 1947, No. 16, decided November 17, 1947. The provision for liquidated damages in the instant case presents no significant differences from those previously held enforceable.

CONCLUSION

The decision below is in accord with principles approved by this Court and further review is not warranted. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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FEBRUARY 1948.